

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Harold L. Cyrus,
Petitioner Below, Petitioner**

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) **No. 11-1041** (Mercer County 10-C-32 & 10-C-84)

**David Ballard, Warden,
Respondent Below, Respondent**

MEMORANDUM DECISION

Petitioner, by counsel Paul R. Cassell, appeals the order of the Circuit Court of Mercer County entered June 3, 2011, denying his petition for writ of habeas corpus. Respondent David Ballard has filed a response and a supplemental appendix by counsel, C. Casey Forbes. Petitioner has filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was convicted by jury of two counts of sexual abuse by a custodian and two counts of incest. The circuit court sentenced him to an effective sentence of twenty to fifty years. Petitioner appealed to this Court and this Court affirmed the circuit court in *State v. Cyrus*, 222 W.Va. 214, 664 S.E.2d 99 (2008).

Petitioner filed a petition for habeas corpus with the circuit court that was denied following an omnibus hearing. This Court refused petitioner's appeal of the denial of his habeas corpus petition. Petitioner filed two secondary habeas corpus petitions, alleging ineffective assistance of his prior habeas counsel. The circuit court consolidated the petitions and denied them after holding an evidentiary hearing. Petitioner now appeals that denial.

The Court has recognized the following standard of review:

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the

underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

Syl. Pt.1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Petitioner's arguments all relate to ineffectiveness of his prior habeas counsel. Specifically, he asserts that his prior habeas counsel was ineffective: 1) in not raising the issue that the jury was improperly provided with a dictionary; 2) in not appropriately addressing petitioner's new evidence argument; 3) in not raising the argument that trial counsel turned state witnesses into expert witnesses with opinions which petitioner asserts were detrimental to his case; 4) in not addressing trial counsel's failure to prevent reference to the underlying abuse and neglect case; 5) in not addressing the failure to provide a hearing device to petitioner during the trial; and 6) in not addressing the allegations of wrongful amendment to the indictment.

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Petitioner argues that the circuit court erred in not finding that his prior habeas counsel was ineffective because prior habeas counsel did not raise an argument as to ineffective assistance of trial counsel when counsel allowed a dictionary to be provided to the jury. Petitioner indicates that during the deliberations at trial, the jury asked the court to provide a dictionary. There was no objection and the dictionary was provided to the jury. It is not known how the jury used the dictionary. At the evidentiary hearing held in the current matter, trial counsel testified that he did not even recall that a dictionary was requested. Petitioner cites *State v. Richards*, 195 W.Va. 544, 550, 466 S.E.2d 395, 401 (1995) that "reference to a dictionary by a juror during deliberations or during the trial of a case is misconduct." In *Richards*, the Court found that the appropriate remedy was remand to require the court to determine how the dictionary was used and if misconduct had occurred. Petitioner argues that in this case it is not possible to determine how the jury used the dictionary as trial counsel cannot even recall its use.

Respondent argues that the circuit court properly held that *State v. Richards* is factually distinguishable from the present case. In *Richards*, without knowledge or approval by the court or the parties, a juror conducted independent research by seeking the definition of "malice" in a dictionary. The circuit court found that the facts of the current case were distinguishable from those present in *Richards* as the jury in the present case requested the dictionary from the court and it was provided to the jury by the court without objection from counsel. The circuit court found that the decision of the petitioner's trial counsel to allow the dictionary to go to the jury was a matter of trial strategy and did not constitute ineffective assistance of counsel. Further, the circuit court concluded that even if it had been ineffective, that it is not reasonably probable that,

but for this action, that the result of the trial would have been different. The Court finds no error in the circuit court's determination.

Petitioner next argues that prior habeas counsel was not effective in raising an argument involving newly discovered evidence. At the omnibus in the first habeas proceeding, prior habeas counsel presented the testimony of the victim who recanted her allegations. Petitioner argues that prior habeas counsel's ineffectiveness lies in not buttressing victim's testimony with additional fact witnesses and medical testimony that would corroborate her recantation. While petitioner acknowledges that evidence of recantation was presented at trial, petitioner argues that further witnesses were available but were not called. At the evidentiary hearing in the current matter, two such witnesses, Avery Clinton Jackson and Danny Ray Goad Sr., testified that they had observed the victim and petitioner around the time when the criminal conduct was alleged to have occurred but saw nothing unusual. In addition to the arguments regarding these additional witnesses, petitioner argues that during a state ordered psychological evaluation of the victim, she recanted but this report was never entered into evidence and the examining psychologist was never called as a witness. Petitioner further argues that a Dr. Wallace examined the victim and found that she had not been abused. Although his report was entered into evidence, Dr. Wallace did not testify at trial.

Respondent argues that the evidence which petitioner alleges is newly discovered is merely cumulative. Citing *State v. O'Donnell*, 189 W.Va. 628, 433 S.E.2d 566 (1993), respondent notes that to grant a new trial on newly discovered evidence, the evidence must be new and material, and not merely cumulative. Furthermore, respondent contends that a new trial based upon newly discovered evidence will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. Applying these factors, respondent indicates that evidence of recantation was presented at trial and the victim was subjected to cross-examination about recantations she had made. At trial, respondent indicates that at least six witnesses testified that they did not see any signs of abuse in the home or while petitioner was performing yard work with the victim. Further, respondent refutes the petitioner's argument that the state ordered psychological evaluation and the evidence of Dr. Wallace would have corroborated the victim's recantation, arguing that the evaluation merely contains another recantation. As to the failure to have Dr. Wallace testify live at trial, the respondent indicates that the first habeas counsel argued error in this omission and the first habeas court found and concluded that Dr. Wallace's testimony would have been damaging to the petitioner, therefore, the decision to limit Dr. Wallace's evidence to his report and not his testimony was a tactical decision.

As asserted by respondent, the circuit court found that at trial, trial counsel called six witnesses to testify to the same matters as testified to by Avery Clinton Jackson and Danny Ray Goad Sr. at the evidentiary hearing in the current matter. The circuit court found that the evidence regarding the recantation was not newly discovered because it was "merely cumulative of matters fully presented at the underlying trial" and was "fully explored at the Omnibus Habeas Corpus Hearing." The circuit court concluded that this issue was without merit. As for Dr. Wallace's report and lack of his live testimony, the circuit court found that same was fully discussed and considered by the court during the first habeas proceeding. Further, the circuit

court recognized that the trial court obtained the express agreement of the petitioner to the use of Dr. Wallace's report in lieu of live testimony. The Court finds no error in the circuit court's determinations.

Petitioner next argues that his prior habeas counsel was ineffective in failing to argue that trial counsel provided ineffective assistance by turning three witnesses for the State, Krystal Leedy, Shannon Beck and Shirly Aycoth, into expert witnesses with opinions that were detrimental to the petitioner's case. For example, petitioner argues that witness Beck was asked if "recantations [can] ever be believed" and responded that they are very common among children who are abused. With Ms. Leedy, petitioner asserts that trial counsel again solicited expert opinion evidence, this time obtaining testimony that few cases of sexual abuse ever have physical evidence. Finally, with Ms. Aycoth, trial counsel had her review an earlier medical report showing that the victim's hymen was intact, giving her the opportunity to again call the jury's attention to the fact that the victim's hymen was not present at the time of her examination of the victim. Petitioner argues that his prior habeas counsel was similarly ineffective for not properly raising this issue.

Respondent argues that the prior habeas counsel was not ineffective regarding the trial counsel's cross-examination of witnesses. Respondent notes that the record indicates that the first habeas counsel raised this issue in the first habeas proceeding and that the first habeas court concluded that the trial counsel was not ineffective. Petitioner replied that while prior habeas counsel raised the issue that trial counsel ineffectively "appealed on issues which were brought forth on their cross-examination of the witnesses during the petitioner's trial . . .", that the prior habeas counsel did not challenge the ineffective assistance of soliciting expert testimony from state's witnesses that was damaging to petitioner's case.

The circuit court found that trial counsel's cross-examination of the State's witnesses was addressed during the first habeas proceeding. Further, the circuit court found that even if trial counsel was ineffective in the cross-examination of the State's witnesses that it is not reasonably probable that, but for such alleged errors, the results of the proceeding would have been different. The Court is persuaded under the facts and circumstances that the circuit court did not err in reaching this conclusion.

Petitioner next argues that the prior habeas counsel was ineffective in addressing trial counsel's failure to prevent reference to the underlying abuse and neglect case. Petitioner argues that the prosecutor repeatedly brought up the abuse and neglect proceedings and trial counsel failed to prevent such references. Petitioner argues that although the trial court found that the existence of the abuse and neglect proceedings was "intrinsic" to the State's case, it failed to recognize that the reference to the result of those proceedings, i.e., termination of parental rights, was not intrinsic and was unnecessary.

Respondent argues that the issue of introduction of the abuse and neglect proceedings was raised and addressed in the direct criminal appeal and that the prior habeas counsel properly raised the claim of ineffective trial counsel due to the introduction and reliance upon those proceedings in the prior habeas action. Trial counsel testified at the evidentiary hearing in the

current matter that he made a calculated decision to introduce the recantation of one of the victims at an abuse and neglect hearing over the dangers evidence of that proceeding might carry. Such a decision was strategic. Respondent asserts that the defense utilized by trial counsel required mention of the intertwined abuse and neglect proceeding and was not ineffective. The circuit court found that the existence of abuse and neglect proceedings was so intrinsic to the State's case that "it could not be separated out." The Court finds no error in this determination.

Petitioner next argues that prior habeas counsel was ineffective due to failure to provide a hearing device to address petitioner's hearing problem. According to petitioner's testimony at the evidentiary hearing in the current matter, petitioner told his trial counsel that he could not hear but trial counsel told him "you don't need to hear." Despite petitioner's testimony in this regard, the circuit court found that from the record, that the petitioner appeared to have heard the proceedings of which he was involved. Petitioner argues that the fact that he could hear some of the proceedings is not proof that he could hear all of the proceedings.

Respondent argues that the circuit court did not err in finding that prior habeas counsel was not ineffective in failing to raise this claim. The circuit court found that the trial court offered hearing devices to the jury during voir dire and that petitioner had ample opportunity to request same, but did not do so. The circuit court noted that at the end of the first day of trial, the trial court addressed petitioner regarding his understanding of his right to testify or remain silent. The circuit court noted that the petitioner made responses to the court's questions as he did during his own testimony at trial. The circuit court cited petitioner's entire trial testimony and found that "petitioner did not appear to have any difficulty hearing the questions of Judge Frazier, the examination of Mr. Smith, or the cross-examination of Ms. Garton" and that his claim that he could not hear and was improperly denied a hearing device is without merit. The Court agrees.

Finally, petitioner argues that the prior habeas counsel should have been found to be ineffective for failing to challenge the trial court's decision to allow the State to amend several counts of the indictment to show that the alleged criminal acts took place in 1997 rather than in 1996. Respondent argues that petitioner's argument regarding the amendment of the underlying indictments lacks merit and is moot as he is not imprisoned on these charges and was in fact acquitted as to all three. As set forth in West Virginia Code § 53-4A-1(a), habeas corpus relief is limited to those persons convicted of a crime and incarcerated under a sentence of imprisonment therefore. The circuit court found that the petitioner's claim that prior habeas counsel was ineffective for failing to raise this issue was without merit because petitioner was acquitted of the charges that were amended. The Court finds no error in the conclusion of the circuit court.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh